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In the Supreme Court of the United States

October Term, 1953

No. 1

Frank De Sapio, Petitioner,

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 201

FRANK De SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioner was adjudicated in contempt of the District Court for the Southern District of New York for his failure to appear before a federal grand jury in that district, pursuant to a subpoena duly served upon him (R. 306a, 325, 354). He was fined $1500 and sentenced to serve a term of imprisonment of six months (R. 320, 354). While his appeal was pending, the District Court, on motion by the United States Attorney, corrected the sentence by striking the fine and entering a judgment *nunc pro tunc*, re-

instating the six months' imprisonment term from February 10, 1959 (R. 379, 379a). The Court of Appeals upheld the conviction but remanded the cause with instructions to enter a judgment which fairly and accurately described the contempt. Its judgment, here sought to be reviewed, was entered on May 29, 1959 (R. 394). No petition for rehearing was filed in the Court of Appeals. The judgment was completely satisfied on July 10, 1959, and the petitioner was released. See 18 U.S.C. 4164.

The petition for a writ of certiorari, filed July 10, 1959, seeks review of the judgment of the Court of Appeals entered May 29, 1959. As such it is out of time under Rule 22(2) of the Rules of this Court.

The proceeding, which resulted in a fixed term of imprisonment for the petitioner's willful failure to obey the subpoena, was clearly in criminal, as distinguished from civil, contempt. See *United States* v. *United Mine Workers*, 330 U.S. 258, 298-299; *Gompers* v. *United States*, 233 U.S. 604, 610-611. While criminal contempt proceedings are in some respects *sui generis*, they are criminal cases. This Court has held that criminal contempt proceedings are criminal cases for the purposes of the Criminal Appeals Act (*United States* v. *Goldman*, 277 U.S. 229, 235-236); the statute of limitations (*Pendergast* v. *United States*, 317 U.S. 412, 417); and the President's pardoning power. (*Ex parte Grossman*, 267 U.S. 87.) It follows that the proceeding is a criminal case within the purview of this Court's rules governing the time for petitioning for a writ of certiorari.

In *Heflin* v. *United States*, 358 U.S. 415, 418, this Court waived the thirty-day time limitation for certiorari under its Rule 22(2) in order to avoid "wasteful circuity." The Court reasoned that, since the petitioner could renew his attack on his sentence at any time under Rule 35, F. R. Crim. P., and because no jurisdictional statute was involved, wasteful circuity would be avoided by waiving the time limitation of Rule 22(2) on the petitioner's untimely petition. *Heflin*, *supra*, however, is inapposite to the facts of the case at bar, for the petitioner is not attacking his sentence as illegal under Rule 35 and cannot recommence this proceeding.

Moreover, the cause is moot, since the petitioner has fully served his sentence for contempt. *St. Pierre* v. *United States*, 319 U.S. 41, 42-43; *In re Lincoln*, 202 U.S. 178, 179-180; *Ex parte Baez*, 177 U.S. 378, 389-390; *Buckner* v. *Hudspeth*, 105 F. 2d 393, 395 (C.A. 10); *Savage* v. *White*, 14 F. 2d 352 (C.A. D.C.). See *Bergdoll* v. *United States*, 279 Fed. 404, 406-407 (C.A. 3), certiorari denied, 259 U.S. 585; *Mills* v. *Green*, 159 U.S. 651, 653-655; *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218; *Cheong Ah Moy* v. *United States*, 113 U.S. 216, 217-218; *List* v. *Pennsylvania*, 131 U.S. 396; *Chandler* v. *Wise*, 307 U.S. 474, 477-478; *Tennessee* v. *Condon*, 189 U.S. 64, 70-71; *Richardson* v. *McChesney*, 218 U.S. 487, 492. This Court has reviewed criminal convictions after the sentence has been fully served where the criminal judgment may continue to have collateral effects. *Pollard* v. *United States*, 352 U.S. 354, 358; *Fiswick* v. *United States*, 329 U.S. 211, 221-222; *United States* v. *Morgan*, 346 U.S. 502, 512-513. However,

as to this contempt conviction, as in the *St. Pierre* case, *supra* (319 U.S. at p. 43), the petitioner has not shown "that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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